

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-419619-002 DT

05/25/2016

HON. TERESA SANDERS

CLERK OF THE COURT
S. Radwanski
Deputy

STATE OF ARIZONA

MARY-ELLEN WALTER

v.

DARNELL MOSES ALVAREZ (002)

MICHAEL ZIEMBA
ANNA M UNTERBERGER

CAPITAL CASE MANAGER

UNDER ADVISEMENT RULING

The Court has read and considered *Defendant's Motion to Amend Indictment re the Necessary Mens Rea for the Statutory Element of the "Circumstances Clause" in A.R.S. Section 13-3623(A)(1)*, the State's response, and the defendant's reply. The Court has also considered the arguments of counsel. The Court finds and orders as follows:

Defendant contends that Counts 2 and 3, Child Abuse, must be amended to include the *mens rea* of intentionally or knowingly as part of the allegation "under circumstances likely to produce death or serious physical injury" because "all of the elements of *Capital Murder* should have an associated *mens rea*." (Motion at 6 (emphasis in original)).

The Arizona Supreme Court rejected these same arguments in *State v. Payne*, 233 Ariz. 484, ¶¶68-73, 314 P.3d 1239 (2013):

1. *Mens rea of "circumstances"*

Payne asserts that the trial court erroneously prohibited him from arguing to the jury that the State must prove that he abused the children "under circumstances [that he intended or knew were] likely to cause death or serious physical injury." This, he claims, turned child abuse into a strict liability offense and, as a result, the court erred in instructing the jury on the elements of child abuse. We review de novo statutory interpretation issues, *State v. Armstrong*

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(*Armstrong III*), 218 Ariz. 451, 463 ¶ 54, 189 P.3d 378, 390 (2008), and whether jury instructions properly state the law, *State v. Johnson*, 212 Ariz. 425, 431 ¶ 15, 133 P.3d 735, 741 (2006).

Section 13-3623(A) makes it crime, “[u]nder circumstances likely to produce death or serious injury,” for a person to cause physical injury to a child or to permit the injury of a child in the person's care or custody. This offense is a class 2 felony “[i]f done intentionally or knowingly.” *Id.* § 13-3623(A)(1). Payne contends that, in order to convict him of child abuse as a class 2 felony, in addition to showing that he intended to cause or knew that he would cause (or permit) injury, the State had to show that he intended or knew that the “circumstances were likely to produce death or serious injury.” Payne thus contends that the intentional or knowing *mens rea* requirement applicable to the other elements of child abuse also applies to the circumstances component. The trial court rejected Payne's construction and instructed the jury that the State must prove “that the defendant committed child abuse in at least one of the three possible manners ..., and that [his actions occurred] under circumstances likely to cause death or serious physical injury” to the children.

If a statute requires a mental state, it applies to each element of the offense unless it “plainly appears” that the legislature intended otherwise. A.R.S. § 13-202(A). The questioned portion of § 13-3623(A) (the “circumstances clause”) provides that abuse must occur “[u]nder circumstances likely to produce death or serious physical injury.” We have not addressed whether any *mens rea* requirement applies to this phrase, but our court of appeals has upheld convictions based solely on objective evidence of the existence of such circumstances, without requiring the state to prove the defendant's intent that the circumstances be such that death or serious injury might occur. *See State v. Johnson*, 181 Ariz. 346, 350, 890 P.2d 641, 645 (App.1995); *State v. Greene*, 168 Ariz. 104, 105–06, 811 P.2d 356, 357–58 (App.1991). Other jurisdictions have similarly interpreted such clauses. *See People v. Sargent*, 19 Cal.4th 1206, 81 Cal.Rptr.2d 835, 970 P.2d 409, 418 (1999) (California's circumstances clause “does not provide that a defendant must ‘know or reasonably should know that his or her actions occur under circumstances or conditions likely to produce great bodily harm or death.’” (quoting Cal.Penal Code § 273a)); *cf. Williams v. State*, 100 Md.App. 468, 641 A.2d 990, 992–93 (Md.Ct.Spec.App.1994) (whether circumstances in reckless endangerment are likely to result in serious physical injury or death is an objective inquiry). “[C]ircumstances likely to produce death or serious physical injury,” unlike the abuse itself, either exist or do not exist. This Court has similarly found the “care and custody” element of § 13-3623(A) to be an

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objective factual inquiry rather than an element for which *mens rea* must be proven. *See State v. Jones*, 188 Ariz. 388, 393-94, 937 P.2d 310, 315–16 (1997).

Moreover, the statute increases the offense level based on the actor's intent: If the offense is “done intentionally or knowingly,” it becomes a class 2 felony. A.R.S. § 13-3623(A)(1). It is a lesser offense if done negligently or recklessly. *See id.* § (A)(2). The structure of the statute thus suggests that the *mens rea* refers to the act that the defendant “does,” and not to the background circumstances. Because we find that the circumstances clause is more like the “care and custody” provision, we decline to apply the *mens rea* to the circumstances clause.

Payne argues that such an interpretation turns child abuse into a strict liability crime. But a statute creates a strict liability crime only if it does not require *any* mental state. *Williams*, 144 Ariz. at 488, 698 P.2d at 733. That is not the case here, as § 13-3623(A) requires at least criminal negligence for the act itself, and the section under which Payne was charged, § 13-3623(A)(1), requires knowledge or intent.

Finally, Payne claims that because the circumstances clause is an element of the crime that enhances punishment and appears in the text defining the offense, the legislature must have intended for it to have a *mens rea* requirement. We disagree. It is the level of intent that enhances the offense level, not the existence of “circumstances.” *See* A.R.S. § 13-3623(A). As such, the court's instructions were correct.

Defendant attempts to distinguish *Payne* by asserting that the Supreme Court did not reach the constitutional claim he has raised in his motion. The Court disagrees. The Supreme Court specifically found that Child Abuse was not a strict liability crime, which is the essence of Defendant's constitutional argument. *See* Motion at 4 (“Thus, and as a constitutional issue here, this court must now decide whether the referenced element is one of strict liability, or if Mr. Alvarez must have a *mens rea* regarding the ‘circumstances clause’ element. Mr. Alvarez asserts that only the latter position will uphold his constitutional rights in this *Capital Murder* case.”)(Emphasis in original). The absence of a *mens rea* requirement for the circumstances clause does not vitiate the State's burden to prove that the particular circumstances were likely to produce death or serious injury. *Payne*, at ¶70.

The Court intends to use the RAJI Statutory Criminal Instruction 36.23A when instructing the jury on the elements of Child Abuse. This instruction is similar to the instruction

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given in *Payne*, which the Supreme Court found correctly stated the law, and thus does not violate the defendant's constitutional rights.

For all of these reasons,

IT IS ORDERED denying Defendant's Motion to Amend Indictment re the Necessary *Mens Rea* for the Statutory Element of the "Circumstances Clause" in A.R.S. Section 13-3623(A)(1).